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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

PATRICK MADDEN, Plaintiff and Appellant, v. DEL TACO, INC., Defendant and Respondent.	C059721 (Super. Ct. No. 03AS04237)

Plaintiff Patrick Madden brought suit against defendant and respondent Del Taco, Inc., for violation of the Americans with Disabilities Act of 1990 (hereafter ADA) (42 U.S.C. § 12101 et seq.; Pub.L. No. 101-336 (July 26, 1990) 104 Stat. 327) and its state analogue, Civil Code section 54 et seq., requiring full and equal access to places of public accommodation for persons with disabilities. The complaint alleged that Madden fell from his wheelchair as he tried to traverse a ramp that was obstructed by a concrete trash container. (See *Madden v. Del Taco, Inc.* (2007) 150 Cal.App.4th 294 (*Madden I*). In *Madden I*, we reversed a summary judgment in favor of Del Taco, concluding that such an obstruction constituted a prima facie violation of

applicable laws ensuring equal access for persons with disabilities. (*Madden I*, at pp. 296, 305.)

After remand in *Madden I*, the case was tried to a jury. The jury found, by special verdict, that Madden did *not* have a physical disability at the time of the incident. Judgment for Del Taco was entered accordingly.

On this appeal, without the benefit of a reporter's transcript, Madden urges reversal of the judgment. We reject most of his arguments summarily because his briefing violates basic rules of appellate procedure and because he has not produced a record adequate for review. The lone argument that is cognizable on this record is without merit. We shall affirm the judgment.

BACKGROUND

Limited summary of facts

This case comes to us without the benefit of a reporter's transcript of the jury trial.[1] The record includes only a clerk's transcript, and a number of exhibits that were admitted

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[1] The record reflects that Madden designated the preparation of a reporter's transcript of jury trial proceedings. However, the superior court clerk served a notice of default because Madden failed to deposit the required transcript fee. (See Cal. Rules of Court, rule 8.130(b), (d).)

Madden then filed a motion for relief from default with this court, in which he expressed his willingness to proceed without a reporter's transcript. We deemed the motion for relief as a notice to proceed without a reporter's transcript, and as such granted it. Madden's later motion to augment the record with *limited* excerpts of trial testimony was denied.

at trial. "'The law is well settled that an appeal on the clerk's transcript and certain exhibits only is to be treated as an appeal on the judgment roll. . . . [¶] Since it is impossible to determine from the clerk's transcript what evidence the trial court heard and considered, this court must assume there was substantial evidence to support the [verdict].'" (*Rubin v. Los Angeles Fed. Sav. & Loan Assn.* (1984) 159 Cal.App.3d 292, 296.)[2]

Factual and procedural background

Madden filed a three-count complaint for damages against Del Taco, alleging negligence, premises liability and violation of the Unruh Civil Rights Act (Civ. Code, § 51 et seq.). The latter cause of action alleged that on August 3, 2002, Madden fell and was injured while attempting to navigate his wheelchair around a concrete trash barrel that was placed on a handicapped ramp leading to the restaurant's entry.

Del Taco moved for summary adjudication on this latter cause of action. The trial court granted the motion, ruling that "[a]n isolated or temporary hindrance to access does not give rise to a claim under the ADA or the state equivalent," and that, as a matter of law, Del Taco's placement of the trash receptacle was an isolated and temporary hindrance. Madden

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[2] The clerk's transcript contains excerpts from the reporter's "daily transcript" of trial proceedings. These excerpts were attached to Del Taco's opposition to Madden's posttrial motions and feature testimony highly favorable to Del Taco.

dismissed his remaining causes of action and appealed from the ensuing judgment. (*Madden I*, *supra*, 150 Cal.App.4th at p. 300.)

We reversed, concluding that an immovable concrete trash container impeding access to the ramp as shown by the evidence constituted a prima facie violation of the ADA and its state law equivalent. (*Madden I*, *supra*, 150 Cal.App.4th at pp. 302-304.)

The discrimination claim was then tried to a jury. A crucial threshold issue submitted for the jury's determination was whether Madden suffered from a "physical disability" on the day of the incident.

Del Taco presented evidence that Madden was not disabled. (See fn. 2, *ante*.) Such evidence included not only the testimony of at least one medical expert who found significant evidence that Madden was malingering, but video clips showing Madden walking up stairs to the second floor of a building, throwing a trash bag into a dumpster, lifting a coffee table, doing his laundry at the Laundromat, and walking across the street to his girlfriend's apartment. Madden's acquaintance and former girlfriend, Constance Cook, testified that Madden used a wheelchair only once during the entire two years she dated him, to go to a doctor's appointment. She further stated that Madden frequently walked long distances without complaining of pain, and that he was selling, rather than taking, his prescription pain medication.

Madden produced his own evidence, including documentation purporting to show that he is disabled and was on the day of the incident.

The court instructed the jury that, in order to recover on his discrimination claim, Madden had to prove that he had a "physical disability" when he sought to enter Del Taco's restaurant. The jury returned with a special verdict that Madden did not suffer from a physical disability on August 3, 2002, effectively terminating the case for the defense.

Madden's motions for new trial and for judgment notwithstanding the verdict (JNOV) were both denied. In its order denying both motions, the trial court wrote: "Plaintiff contends there was no conflicting or competent expert medical testimony to support the jury's conclusion that he was not disabled. Plaintiff's motion presents a very one-sided view of the evidence. The strength of his evidence is not the test. The evidence in the record as a whole must be considered in the light most favorable to defendant. As defendant points out, considered in that light, there is ample evidence in the record that plaintiff could conduct major, everyday life activities without difficulty. This is substantial evidence on which the jury could rest its decision."

Madden now appeals from the judgment and the order denying his motion for JNOV.[3]

DISCUSSION

I. Madden Is Precluded from Claiming the Evidence Showed Disability as a Matter of Law

A. Unacceptable Briefing

Madden's briefing is disorganized, difficult to follow and replete with claims that repeatedly overlap one another. As best as we can discern, his primary claim is that the trial court should never have submitted the disability issue to the jury, because his own evidence conclusively showed he was disabled. According to this argument, submitting the disability issue for determination by the jurors invited them to engage in a "free-for-all inquiry" and base their verdict on inadmissible speculation. The claim fails on several grounds.

First, Madden's opening brief is based on a highly one-sided summary of evidence supporting his position, including references to exhibits ruled inadmissible by the trial judge. Nowhere do his briefs contain a fair and balanced presentation,

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[3] Madden's notice of appeal also purports to appeal from the order denying his motion for new trial. Such an order is nonappealable. (9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 206, p. 281 (Witkin); *Rodriguez v. Barnett* (1959) 52 Cal.2d 154, 156.) However, the order is reviewable on appeal from the judgment. (Civ. Code, § 906; *Young v. Brunicardi* (1986) 187 Cal.App.3d 1344, 1348, fn. 1; 9 Witkin, *supra*, § 89, p. 150.)

much less a serious discussion, of the evidence presented by Del Taco tending to show that he was not disabled.

In claiming that the evidence was susceptible of only one conclusion, it was Madden's burden to set forth *all material evidence* bearing on the issue, not merely the evidence favorable to him. Such a presentation must include citations to the record where the evidence may be found, and must set forth a reasoned demonstration of how the evidence does not sustain the challenged ruling or verdict. A violation of these rules works a forfeiture of the argument. (*Foreman & Clark Corp.* v. *Fallon* (1971) 3 Cal.3d 875, 881; *Road Sprinkler Fitters Local Union No. 669 v. G & G Fire Sprinklers, Inc.* (2002) 102 Cal.App.4th 765, 782.)

Second, the headings Madden uses are not logically tethered to the arguments he raises. His arguments include extraneous claims unrelated to the headings under which they appear. Rule 8.204(a)(1)(B) of the California Rules of Court requires that each appellate brief "[s]tate each point under a separate heading or subheading summarizing the point . . . ." Arguments not presented in accordance with this rule are deemed forfeited. (See, e.g., *Opdyk v. California Horse Racing Bd.* (1995) 34 Cal.App.4th 1826, 1830-1831, fn. 4.)

Finally, counsel was required to submit a brief supporting each point with citation to *pertinent authority*, and to support all references to factual matters with citations to the volume and page number of the record. (Cal. Rules of Court, rule

8.204(a)(1)(B), (C).) This court is not required to make an independent search of the record for facts that support Madden's position. (E.g., *Mansell v. Board of Administration* (1994) 30 Cal.App.4th 539, 545-546.) Thus, where an appellant fails to provide citations to factual matters supporting his arguments, we may disregard the arguments. (*City of Lincoln v. Barringer* (2002) 102 Cal.App.4th 1211, 1239, fn. 16; *Duarte v. Chino Community Hospital* (1999) 72 Cal.App.4th 849, 856.)

Because Madden's argument flagrantly violates all of the above rules, it is deemed forfeited.

B. Inadequate Record

In addressing an appeal, this court begins with the presumption that the judgment of the trial court is correct. (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133.) Thus, "a party challenging a judgment has the burden of showing reversible error by an adequate record." (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 574.)

"Appellants who appeal only on the clerk's transcript or an appendix, failing to provide a reporter's transcript of the oral proceedings [citation], cannot challenge sufficiency of the evidence. In such event, the evidence is conclusively presumed to support the judgment." (Eisenberg et al.; Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2009) ¶ 8:47, p. 8-22, italics omitted.)

As noted, Madden argues that the trial court erred in refusing to issue a directed verdict that he was disabled. Such

a claim implies the evidence was susceptible of only one conclusion, yet we have not been provided with that part of the record that is indispensable to an assessment of the argument's validity: a complete transcript of the trial testimony. The lack of a reporter's transcript renders it impossible for us to determine whether the trial court erred. Where "the record on appeal consists of only a clerk's transcript and exhibits and no error appears on the face of the record, the sufficiency of the evidence to support the trial court's rulings is not open to consideration by a reviewing court; in such a case, 'any condition of facts consistent with the validity of the judgment will be presumed to have existed rather than one which would defeat it [citations].'" (*County of Los Angeles v. Surety Ins. Co.* (1984) 152 Cal.App.3d 16, 23.)

Accordingly, all of Madden's arguments to the effect that the trial court should have granted a directed verdict on the issue of disability[4] are forfeited and/or nonreviewable.

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[4] Sandwiched into the same portion of Madden's brief is the claim that the trial court was bound by the finding of the Social Security Administration that he was disabled, though Madden admits the finding was based on "mild retardation," a disability unrelated to wheelchair access.

The argument is impossible to follow, since it is not accompanied by applicable legal authority and surfaces sporadically amid a throng of unrelated contentions, including assertions of evidentiary error not separately headed. Furthermore, Madden fails to point to any place in the record where this argument was raised in the trial court.

Consequently, we do not pass on the merits of this purported preemption claim. (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-785 (*Badie*) [arguments made without

II. Jury Instructions

In a separately headed argument, Madden claims the trial court erroneously instructed the jury regarding the definition of disability under the ADA. That argument, too, is forfeited.

Nowhere does Madden's presentation demonstrate how the court misled the jury. Madden's brief neither compares the court's instruction with applicable law, nor points to any discrepancy between the two. He merely quotes the court's instruction and follows it with quotations from his own proposed instructions. Where a point is asserted without reasoned argument or citation to pertinent authority, it is deemed abandoned and deserves no further consideration. (*Badie*, *supra*, 67 Cal.App.4th at pp. 784-785; *Landry v. Berryessa Union School Dist.* (1995) 39 Cal.App.4th 691, 699-700.) Accordingly, this section of Madden's brief raises no cognizable issue.

III. Judicial Estoppel

In the lone argument that has not been forfeited to unacceptable briefing or an inadequate record, Madden claims that under the doctrine of judicial estoppel, he was entitled to a directed verdict on the issue of disability. Specifically, Madden asserts that Del Taco's factual averments in its separate statement of undisputed facts in support of summary adjudication

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citation to pertinent authority may be disregarded]; *Richmond v. Dart Industries, Inc.* (1987) 196 Cal.App.3d 869, 874 ["'A party is not permitted to change his position and adopt a new and different theory on appeal. To permit him to do so would not only be unfair to the trial court, but manifestly unjust to the opposing litigant.'"].)

(SSUF) amounted to a binding judicial admission that he suffered from a disability, thereby precluding Del Taco from relitigating the matter at trial. The claim lacks merit, both factually and legally.

At the outset, Madden fails to point to any statement by Del Taco in its SSUF that could reasonably be construed as an admission he was "disabled" within the meaning of the ADA. Madden cites only Del Taco's statements in the SSUF that he "went to [defendant's restaurant] in his wheelchair"; that Madden "alleges that he was forced to navigate his wheelchair around the trash barrel on the south ramp, causing him to fall"; that he "told a Del Taco employee that the trash barrel blocked his way"; that the employee then moved the barrel; and that, after eating his food, Madden left the restaurant, "using his wheelchair to exit by way of the north ramp."

It is self-evident that an able-bodied person (especially one who is intent on creating a lawsuit out of thin air) can use a wheelchair to transport himself just as easily as one who is handicapped. Thus, Del Taco's "admission" that Madden used a wheelchair to enter and leave its restaurant says nothing about whether he *actually* suffered from a disability on August 3, 2002.

But even if Del Taco's SSUF did contain a statement that Madden was disabled, it would not have preclusive effect at trial, as demonstrated by our recent holding in *Myers v. Trendwest Resorts, Inc.* (2009) 178 Cal.App.4th 735 (*Myers*).

Myers sued defendant Trendwest Resorts, Inc. (Trendwest), for sexual harassment in employment under the California Fair Employment and Housing Act (Gov. Code, § 12940 et seq.). As in the case here, the defendant initially prevailed at the summary judgment stage, but we reversed, finding a triable issue of fact with respect to Myers's sexual harassment claims. After remand, the case proceeded to jury trial, and the jury found that Myers had not been subjected to unwanted harassment. (*Myers*, *supra*, 178 Cal.App.4th at p. 738.)

Relying on "Trendwest's statement of undisputed facts accompanying the motion for summary judgment as a judicial admission of the facts contained therein," Myers argued that the court should have granted her motion for judgment notwithstanding the verdict because Trendwest was judicially estopped from denying that her supervisor sexually harassed her. (*Myers*, *supra*, 178 Cal.App.4th at p. 746.)

We disagreed. We held that while statements in *pleadings* may constitute judicial admissions, "neither a motion for summary judgment nor its accompanying statement of undisputed facts constitutes pleadings within the meaning of Code of Civil Procedure section 422.10. Motions for summary judgment do not serve the same purpose as pleadings in setting forth factual allegations. To the contrary, motions for summary judgment by defendants seek to show that they are entitled to dismissal as a matter of law." (*Myers*, *supra*, 178 Cal.App.4th at p. 747.) Thus, "'[t]he agreement in the separate statement that a fact is

"undisputed" is a concession only for purposes of the summary judgment motion. It is not evidence (because not under oath or verified); nor is it a judicial admission.'" (*Ibid.*, quoting Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2008) ¶ 10:194, p. 10-71 (rev. #1, 2009).)

In concluding that judicial estoppel did not apply to factual statements in a summary judgment motion, we also noted that "[a]ccepting Myers's argument would require us to force defendants to play a risky game of roulette whenever moving for summary judgment. To secure dismissals for lack of triable issues of material fact, defendants would have to conclusively surrender the chance to contest facts they might believe themselves able to disprove. . . . [¶] . . . We will not undermine the value of this procedural vehicle for ascertaining whether triable issues of fact exist by holding that the separate statements of undisputed fact can haunt unsuccessful movants if the case goes to trial." (*Myers*, *supra*, 178 Cal.App.4th at pp. 748-749.)

Under the authority of *Myers*, Madden's claim of judicial estoppel must be rejected.[5]

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[5] In a related claim, Madden contends that under the "law of the case," our decision in *Madden I* compelled a factual finding that he was disabled. The argument is seriously misguided. Law of the case says that where the appellate court announces a "'principle or rule of law'" that is necessary to its decision, it must be adhered to in all subsequent proceedings. (9 Witkin, *supra*, Appeal, § 459, p. 515, quoting *Tally v. Ganahl* (1907) 151 Cal. 418, 421.) But the doctrine applies only to *principles of law*; it does *not* give conclusive effect to determinations of

IV. Motion For New Trial

Madden contends the trial court erred by denying his motion for new trial because "there was no competent medical testimony or medical document" to support the jury finding that he was not disabled.

The trial judge is given broad discretion in ruling on a motion for new trial and, on appeal, the test for reversal is whether the trial court abused that discretion. (*City of Los Angeles v. Decker* (1977) 18 Cal.3d 860, 871-872; see also *Jiminez v. Sears, Roebuck & Co.* (1971) 4 Cal.3d 379, 387 [order denying new trial must be affirmed "unless a manifest and unmistakable abuse of discretion clearly appears"].) In making this determination, it is our duty to review the *entire* record, including the evidence presented at trial, to determine whether prejudicial error occurred. (*Decker*, *supra*, 18 Cal.3d at p. 872.)

A claim that there was "no competent medical testimony" presented on a particular issue is patently incapable of review without a record of the testimony that was adduced. Since no such record is available, the order denying a motion for new

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the facts themselves. (9 Witkin, *supra*, § 465, at p. 523, citing *Moore v. Trott* (1912) 162 Cal. 268, 273.) Indeed, with very rare exceptions, appellate courts do not engage in fact finding when reversing a judgment. (9 Witkin, *supra*, § 315, p. 364.) To do so would usurp the role of the trial courts as arbiters of the facts. (*Tupman v. Haberkern* (1929) 208 Cal. 256, 269.)

trial is conclusively presumed correct. (*Bond v. Pulsar Video Productions* (1996) 50 Cal.App.4th 918, 924.)

DISPOSITION

The purported appeal from the order denying a new trial is dismissed. (See fn. 3, *ante*.) The judgment and the order denying the motion for JNOV are affirmed. Del Taco shall recover its costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1), (2).)

BUTZ, J.

We concur:

NICHOLSON, Acting p. J.

RAYE, J.